No. 07-481

In the Supreme Court of the United States

RICKY MARTIN LLOYD WALTERS, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
DONALD E. KEENER
JENNIFER J. KEENEY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals erred in converting a petition for a writ of habeas corpus, in which petitioner challenged the validity of a final order of removal, into a petition for judicial review, where the government's appeal from the district court's grant of habeas relief was pending at the time of the enactment of the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302.

2. Whether the court of appeals erred in transferring the converted petition for review to the United States Court of Appeals for the circuit in which the removal proceedings that culminated in the final order of removal from which petitioner sought relief in the petition for a writ of habeas corpus had been conducted.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 13
Conclusion 23

TABLE OF AUTHORITIES

Cases:

Ali v. *Gonzales*, 421 F.3d 795 (9th Cir. 2005) 17
Alvarez-Barajas v. *Gonzales*, 418 F.3d 1050 (9th Cir. 2005) 19, 20
American Constr. Co. v. *Jacksonville Ry.*, 148 U.S. 372 (1893) 13
Bonhometre v. *Gonzales*, 414 F.3d 442 (3d Cir. 2005), cert. denied, 546 U.S. 1184 (2006) 16, 17
Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) 13
Gittens v. *Menifee*, 428 F.3d 382 (2d Cir. 2005) .. 12, 18
Gonzales-Gomez v. *Achim*, 441 F.3d 532 (7th Cir. 2006) 17
Gonzalez-Gonzalez v. *Weber*, 472 F.3d 1198 (10th Cir. 2006) 16, 17
Hallowell v. *Commons*, 239 U.S. 506 (1916) 19
Hamdan v. *Rumsfeld*, 126 S. Ct. 2749 (2006) 19
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 13

Cases—Continued Page

Hernandez v. *Gonzales*, 424 F.3d 42 (1st Cir. 2005) . 17
INS v. *St. Cyr*, 533 U.S. 289 (2001) 6, 20
Ishak v. *Gonzales*, 422 F.3d 22 (1st Cir. 2005) 16, 18, 20
Jama v. *Gonzales*, 431 F.3d 230 (5th Cir. 2005) 18
Kolkevich v. *Attorney Gen. of the United States*, 501 F.3d 323 (3d Cir. 2007) 18
Madu v. *United States Att'y Gen.*, 470 F.3d 1362 (11th Cir. 2006) 17
Major League Baseball Players Ass'n v. *Garvey*, 532 U.S. 504 (2001) 14
Marquez-Almanzar v. *INS*, 418 F.3d 210 (2d Cir. 2005) 18
Moreno-Bravo v. *Gonzales*, 463 F.3d 253 (2d Cir. 2006) 12, 13, 16
Nadarajah v. *Gonzales*, 443 F.3d 1069 (9th Cir. 2006) 17
Padilla v. *Gonzales*, 470 F.3d 1209 (7th Cir. 2006) ... 16
Phillips v. *Seiter*, 173 F.3d 609 (7th Cir. 1999) 13
Rafaelano v. *Wilson*, 471 F.3d 1091 (9th Cir. 2006) .. 16
Rosales v. *Bureau of Immigration & Customs Enforcement*, 426 F.3d 733 (5th Cir. 2005), cert. denied, 546 U.S. 1106 (2006) 16
Sol v. *INS*, 274 F.3d 648 (2d Cir. 2001), cert. denied, 536 U.S. 941 (2002) 10, 14
Swain v. *Pressley*, 430 U.S. 372 (1977) 20
VMI v. *United States*, 508 U.S. 946 (1993) 13

Cases—Continued: Page

Walters v. *INS*, No. 97-409, 1998 WL 537197 (2d Cir. June 12, 1998) 6, 7
Yeung, In re, 21 I. & N. Dec. 610 (B.I.A. 1997) 6

Constitution, statutes and rule:

U.S. Const. Amend. V (Due Process Clause) 9, 10
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 6
§ 440(d), 110 Stat. 1277 6
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546:
§ 309(c)(4), 110 Stat. 3009-626 8
§ 309(c)(4)(G), 110 Stat. 3009-626 8
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1101 note 4, 12
8 U.S.C. 1182(a)(2) 8
8 U.S.C. 1182(a)(2)(A)(i)(I) 7
8 U.S.C. 1182(a)(9)(A)(ii) 5, 7
8 U.S.C. 1182(c) (1994) 5, 6, 9
8 U.S.C. 1182(h) (1994) 5, 6
8 U.S.C. 1225(b)(1) 2
8 U.S.C. 1227(a)(2)(A)(iii) 8
8 U.S.C. 1227(a)(2)(C) 8
8 U.S.C. 1252 (2000 & Supp. V 2005) 4, 12
8 U.S.C. 1252(a)(2)(A) (Supp. V 2005) 2

Statutes and rule—Continued: Page

8 U.S.C. 1252(a)(2)(B) (Supp. V 2005) 2
8 U.S.C. 1252(a)(2)(C) (Supp. V 2005) 3
8 U.S.C. 1252(a)(2)(D) (Supp. V 2005) 3, 14, 21
8 U.S.C. 1252(a)(5) (Supp. V 2005) .. 2, 15, 17, 18, 19
8 U.S.C. 1252(b)(1) 4
8 U.S.C. 1252(b)(2) 4, 12, 21, 22
8 U.S.C. 1252(b)(9) (Supp. V 2005) 3
8 U.S.C. 1252(e) 2
8 U.S.C. 1252 note (Supp. V 2005) 3, 4, 11, 12, 15, 19
8 U.S.C. 1255 5
REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302 ..... 2, 11
§ 106(a)(1), 119 Stat. 310 2
§ 106(a)(1)(A)(i), 119 Stat. 310 2
§ 106(a)(1)(A)(ii), 119 Stat. 310 2
§ 106(a)(1)(A)(iii), 119 Stat. 310 3
§ 106(a)(2), 119 Stat. 311 3
§ 106(b), 119 Stat. 311 ..... 3, 11, 15
§ 106(c), 119 Stat. 311 ..... 3, 4, 12, 19
28 U.S.C. 1361 3
28 U.S.C. 1651 3
28 U.S.C. 2241 (2000 & Supp. V 2005) 3
Fed. R. Civ. P. 12(h)(1) 22

Miscellaneous:

H.R. Conf. Rep. No. 109th Cong., 1st Sess. (2005) ... 17

In the Supreme Court of the United States

No. 07-481

RICKY MARTIN LLOYD WALTERS, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The summary order of the court of appeals (Pet. App. 1-6) is not published in the *Federal Reporter* but is reprinted in 198 Fed. Appx. 78. The opinion and order of the district court (Pet. App. 7-29) is reported at 291 F. Supp. 2d 237.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 2006. A petition for rehearing was denied on May 24, 2007 (Pet. App. 41-42). On August 14, 2007, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including October 9, 2007, and the petition was filed on that date. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 11, 2005, the President signed into law the REAL ID Act of 2005 (REAL ID Act or Act), Pub. L. No. 109-13, Div. B, 119 Stat. 302. The REAL ID Act eliminates habeas corpus jurisdiction to review orders of removal, and prescribes, subject to one exception not at issue here, that "the sole and exclusive means for judicial review of an order of removal" is by way of a petition for review in the appropriate court of appeals. § 106(a)(1), 119 Stat. 310 (8 U.S.C. 1252(a)(5) (Supp. V 2005));[1] see § 106(a)(1)(A)(i) and (ii), 119 Stat. 310 (making similar amendments to 8 U.S.C. 1252(a)(2)(A), (B)

---

[1] Section 1252(a)(5) reads in full:

> Exclusive means of review
>
> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

8 U.S.C. 1252(a)(5) (Supp. V 2005). Section 1252(e), in turn, preserves limited habeas jurisdiction to review determinations under 8 U.S.C. 1225(b)(1), which provides expedited removal procedures for certain aliens who have not been admitted or paroled. See 8 U.S.C. 1252(e).

and (C) (Supp. V 2005)).[2] The Act further provides that an alien whose criminal convictions previously operated to preclude judicial review of an order of removal by way of a petition for review may now obtain "review of constitutional claims or questions of law" via such a petition. § 106(a)(1)(A)(iii), 119 Stat. 310 (8 U.S.C. 1252(a)(2)(D) (Supp. V 2005)).

The REAL ID Act contains additional provisions designed to effectuate the transition to a unitary system of judicial review of removal orders. Section 106(b) establishes the effective date of the provisions described above, providing that they "shall take effect upon the date of the enactment of this division and shall apply to cases in which the final administrative order of removal, deportation, or exclusion was issued before, on, or after the date of the enactment of this division." § 106(b), 119 Stat. 311 (8 U.S.C. 1252 note (Supp. V 2005)).

Section 106(c) of the Act specifically addresses habeas petitions challenging "a final administrative order of removal, deportation, or exclusion" that were "pend-

---

[2] Section 106(a)(2) of the REAL ID Act, 119 Stat. 311, also amended 8 U.S.C. 1252(b)(9). That section now provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under [28 U.S.C. 2241 (2000 & Supp. V 2005)] or any other habeas corpus provision, by [28 U.S.C. 1361 or 28 U.S.C. 1651], or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

8 U.S.C. 1252(b)(9) (Supp. V 2005).

ing in a district court on" the date of its enactment. 119 Stat. 311 (8 U.S.C. 1252 note (Supp. V 2005)). In such situations, the REAL ID Act provides that "the district court shall transfer the case * * * to the court of appeals for the circuit in which a petition for review could have been properly filed under [8 U.S.C. 1252 (2000 & Supp. V 2005) or 8 U.S.C. 1101 note]." REAL ID Act § 106(c), 119 Stat. 311 (8 U.S.C. 1252 note (Supp. V 2005)); see 8 U.S.C. 1252(b)(2) (providing that petitions for review "shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings"). Following such a transfer, the Act further specifies that "[t]he court of appeals shall treat the transferred case as if it had been filed pursuant to a petition for review under [8 U.S.C. 1252]," with the exception that the alien is not subject to the usual 30-day deadline for filing a petition for review contained in 8 U.S.C. 1252(b)(1). See REAL ID Act, § 106(c), 119 Stat. 311 (8 U.S.C. 1252 note (Supp. V 2005)).

2. Petitioner is a citizen of the United Kingdom who entered the United States as a lawful permanent resident in April 1976. Pet. App. 8. In March 1991, petitioner pleaded guilty to two counts of attempted murder in the second degree and eight counts involving firearms violations. *Ibid.* He was sentenced to an indeterminate term of between three-and-one-third and ten years of imprisonment. *Ibid.*

3. a. On November 29, 1993, the Immigration and Naturalization Service (INS) commenced deportation proceedings against petitioner, charging that his 1991 convictions rendered him deportable. Pet. App. 8-9. Petitioner contested deportability and sought two forms of discretionary relief, and an immigration judge (IJ) in New York held five days of hearings between March and

June of 1995. *Id.* at 9. On June 19, 1995, the IJ issued an oral decision finding that petitioner was deportable as charged, but granting him a waiver of deportation under former 8 U.S.C. 1182(c) (1994) and former 8 U.S.C. 1182(h) (1994), as well as adjustment of status under 8 U.S.C. 1255. Pet. App. 9-10.

b. The INS appealed the IJ's determination to the Board of Immigration Appeals (BIA or Board), arguing that petitioner did not merit the discretionary relief granted by the IJ. Pet. App. 10. On November 7, 1995, the BIA affirmed the IJ's decision, concluding that petitioner was eligible for relief under former 8 U.S.C. 1182(c) (1994). Pet. App. 11.

c. On December 8, 1995, the INS filed with the Board a motion to reopen petitioner's deportation proceedings and to reconsider its earlier decision. Pet. App. 11. Under former 8 U.S.C. 1182(c) (1994), an alien was ineligible for a waiver of deportation if he "has been convicted of one or more aggravated felonies and *has served* for such felony or felonies a term of imprisonment of at least 5 years." (emphasis added). It is undisputed that, at the time of the IJ's initial June 19, 1995, decision, petitioner had not yet served five years in prison. Pet. App. 9 n.4. But, the INS argued, the BIA had erred in affirming the IJ's grant of discretionary relief under Section 1182(c), because, as of the date of the BIA's November 7, 1995, decision, petitioner *had* served five years in prison. *Id.* at 11 & n.6. In support of that argument, the INS attached a letter from the superintendent of a New York state prison stating that, as of October 19, 1995, petitioner had served 5 years and 14 days in prison. *Id.* at 11-12. The INS acknowledged that it had received the letter in question on October 23,

1995, two weeks before the BIA had issued its November 7, 1995, ruling. *Ibid.*

On March 26, 1997, the Board granted the INS's motion, vacated its November 1995 decision, and ordered that petitioner be removed to the United Kingdom. Pet. App. 37-38. The Board concluded that the INS was "correct that at the time we rendered our decision on November 7, 1995, [petitioner] was not eligible for [Section 1182(c)] relief." *Id.* at 37.[3] Having rejected the basis upon which it had initially affirmed the IJ's decision, the BIA next addressed the IJ's alternative conclusion that petitioner was entitled to a waiver under former Section 1182(h). *Id.* at 38. The Board disagreed with that determination as well, concluding that petitioner's "conviction [for] an aggravated felony" rendered him "also ineligible for a section [1182(h)] waiver." *Ibid.* (citing *In re Yeung*, 21 I. & N. Dec. 610, 613-614 (B.I.A. 1997)).

d. Petitioner filed a petition for review of the BIA's March 26, 1997, decision with the United States Court of Appeals for the Second Circuit. Pet. App. 12. On June 12, 1998, the Second Circuit dismissed the petition for review based on lack of jurisdiction. *Walters* v. *INS*, No. 97-4091, 1998 WL 537197. Under then-governing law,

---

[3] The BIA determined that petitioner had also, by the time of its March 26, 1997, decision, been rendered "statutorily ineligible for [Section 1182(c)] relief" as a result of a never-codified provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, that barred such relief for aliens who had been convicted of certain specified offenses, including an aggravated felony. Pet. App. 37-38 (quoting AEDPA § 440(d), 110 Stat. 1277)). In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that relief under former 8 U.S.C. 1182(c) is not barred to aliens, like petitioner, who pleaded guilty to an aggravated felony at a time when that relief was available. See *St. Cyr*, 533 U.S. at 326.

the courts of appeals lacked jurisdiction over petitions for review filed by an alien, such as petitioner, who had been found removable based on his conviction for an aggravated felony or certain firearms offenses. *Id.* at *1. The court of appeals stated, however, that petitioner "may * * * endeavor to pursue his constitutional claims * * * by way of a petition for a writ of habeas corpus filed in the district court in the district in which he is incarcerated, pursuant to 28 U.S.C. § 2241." *Ibid.*

Petitioner did not file a petition for a writ of habeas corpus or seek other relief following the Second Circuit's dismissal of his 1997 petition for review. At some point thereafter, petitioner departed from the United States. Pet. App. 13.

4. a. In 2002, petitioner sought admission to the United States at a Miami seaport, and was detained by INS officials. Pet. App. 34. On June 1, 2002, the INS issued a Notice to Appear, charging that petitioner was inadmissible for two independent reasons. C.A. App. 39-41. First, the Notice to Appear charged that petitioner's 1991 convictions constituted offenses involving "moral turpitude" within the meaning of 8 U.S.C. 1182(a)(2)(A)(i)(I). C.A. App. 39. Second, the Notice to Appear charged that petitioner's departure from the United States while the 1997 deportation order was still pending rendered him inadmissible for a period of ten years following the date of his departure under 8 U.S.C. 1182(a)(9)(A)(ii). C.A. App. 40.

b. On July 12, 2002, an IJ sitting in Florida found petitioner inadmissible as charged on both grounds cited in the Notice to Appear, denied his applications for relief, and ordered him removed to the United Kingdom. Pet. App. 34-36. The IJ rejected petitioner's request that the IJ "terminate" or "reopen" the BIA's March 26,

1997, order that he be deported to the United Kingdom, stating: "I just don't have the authority to do that." *Id.* at 36.

c. Petitioner filed an administrative appeal of the IJ's decision with the BIA.[4] On November 25, 2002, the Board affirmed the IJ's decision without opinion. Pet. App. 32.

d. On December 3, 2002, petitioner filed a petition for review with the United States Court of Appeals for the Eleventh Circuit. Pet. App. 13. On January 30, 2003, the Eleventh Circuit dismissed the petition for review based on lack of jurisdiction. *Id.* at 14; see Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 309(c)(4) and (4)(G), 110 Stat. 3009-626 (8 U.S.C. 1101 note) (stating that, in situations "in which a final order of exclusion or deportation is entered more than 30 days after" IIRIRA's effective date of September 30, 1996, "there shall be no appeal permitted in the case of an alien who is inadmissible * * * by reason of having committed," *inter alia*, a crime of moral turpitude under 8 U.S.C. 1182(a)(2), an aggravated felony under 8 U.S.C. 1227(a)(2)(A)(iii), or certain firearms offenses under 8 U.S.C. 1227(a)(2)(C)).

5. a. On December 2, 2002, petitioner, who was at the time being detained in Bradenton, Florida, see C.A. App. 7, commenced the proceeding that led to the filing

---

[4] On August 13, 2002, while his administrative appeal was still pending before the BIA, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida. Pet. App. 13. On September 10, 2002, the court denied that petition, holding that petitioner had failed to exhaust administrative remedies. *Ibid.* Petitioner did not appeal the district court's decision to the Eleventh Circuit.

of this petition for a writ of certiorari. On that date, he filed a petition for a writ of habeas corpus, and an accompanying motion for a stay of removal, with the United States District Court for the Southern District of New York. Pet. App. 14. The named respondents were then-Attorney General John Ashcroft, the INS, and the INS District Director for the New York City District Office. C.A. App. 6-7. In his petition for a writ of habeas corpus, petitioner asked the district court to "[v]acate the [March 26, 1997] BIA order and reinstate the [June 19, 1995] order of the immigration judge granting [p]etitioner a waiver [of deportation] under [former 8 U.S.C. 1182(c) (1994)]." C.A. App. 21. In support of that request, petitioner asserted that the BIA had violated the Due Process Clause by vacating the IJ's decision granting him relief under former 8 U.S.C. 1182(c) (1994) "solely because the INS, who lost at trial and on appeal, * * * kept proceedings going until it could argue that [petitioner] became ineligible for the waiver [of deportation]." C.A. App. 13.

b. On November 3, 2002, the district court granted the petition for a writ of habeas corpus, "vacate[d]" the BIA's March 26, 1997, decision that had ordered petitioner deported, and "reinstate[d]" the BIA's November 7, 1995, decision that had affirmed the IJ's decision granting petitioner relief under former 8 U.S.C. 1182(c) (1994). Pet. App. 28; see *id.* at 7-29.

The district court concluded that it "would apparently not have personal jurisdiction over the [INS's] Miami District Director," the INS official responsible for the territory in which petitioner was being detained. Pet. App. 14. But the court determined that the Attorney General was also a proper respondent in a habeas petition brought by an alien challenging a final order of

removal, and that it had personal jurisdiction over the Attorney General. *Id.* at 14-19. The court also concluded that the "traditional principles of venue" that are applicable to habeas petitions counseled that the proper venue for this petition is in the Southern District of New York. In support of that latter conclusion, the district court stated that "[a]lthough [p]etitioner is presently detained in Florida, the nature of his challenge to the most recent order of removal is based on the propriety of his original order of removal," which involved a New York-based crime and was overseen by a New York-based IJ. *Id.* at 19. As for subject-matter jurisdiction, the court concluded that "[i]nsofar as [p]etitioner asks the Court to decide whether the BIA abused its decision [*sic*] when it granted the INS' Motion to Reconsider, this Court has no jurisdiction to consider such a claim." *Id.* at 20-21 (citing *Sol* v. *INS*, 274 F.3d 648, 651 (2d Cir. 2001), cert. denied, 536 U.S. 941 (2002)). Rather, the court stated that it had jurisdiction "over only 'purely legal statutory and constitutional claims.'" *Id.* at 21 (quoting *Sol*, 274 F.3d at 651).

With respect to the merits, the district court concluded that the BIA had violated both the Due Process Clause and its own regulations by granting the INS's motion to reopen or reconsider its November 7, 1995, decision based on "the 'new' evidence [regarding the duration of petitioner's incarceration] contained in the [October 19, 1995] letter, which the INS had failed to offer in a timely fashion. Pet. App. 24. The court noted that the INS had "concede[d] that the letter was available to the INS Trial Attorney two weeks before [the BIA's] original decision," and it concluded that permitting the INS to supplement the record in such a fashion constituted a "violation of fundamental fairness." *Id.* at

25-26. The district court also determined that petitioner was not required to demonstrate prejudice in order to obtain habeas relief, but held "in the alternative" that petitioner had shown prejudice because "but for the BIA's procedural error in reopening the record, [petitioner] would not have been ordered removed." *Id.* at 27-28.

c. On January 5, 2004, respondents filed a notice of appeal to the Second Circuit. C.A. App. 693-694. On May 11, 2005, before respondents' appeal had been resolved, the President signed into law the REAL ID Act, Pub. L. No. 109-13, Div. B, 119 Stat. 302, which took effect that same day, REAL ID Act § 106(b), 119 Stat. 311 (8 U.S.C. 1252 note (Supp. V 2005)). In their opening brief, which was filed on June 15, 2005, respondents argued that the REAL ID Act required the court of appeals to convert the petition for a writ of habeas corpus into a petition for review, and to transfer it to the Eleventh Circuit. Gov't C.A. Br. 25-32.

On September 20, 2006, the Second Circuit issued a summary order that vacated the district court's judgment, converted the petition for a writ of habeas corpus into a petition for review, and transferred the petition for review to the Eleventh Circuit. Pet. App. 1-7. The court of appeals stated that the REAL ID Act "eliminates the habeas jurisdiction of the district courts over claims challenging final removal orders, and provides that petitions for review filed with the Courts of Appeal shall be the exclusive means for challenging final removal orders." *Id.* at 3. The court further noted that "[b]y its express terms, the Act is retroactive," and applies to all final orders of removal, regardless of when they were issued. *Ibid.* And although it acknowledged that "the statute does not expressly provide for the dis-

position of habeas petitions that were pending on appeal on the date of enactment," the court of appeals described it as "well-established that we must vacate the District Court's opinion and order, and convert this appeal into a petition for review." *Id.* at 4 (citing *Gittens* v. *Menifee*, 428 F.3d 382 (2d Cir. 2005) (per curiam), and *Moreno-Bravo* v. *Gonzales*, 463 F.3d 253 (2d Cir. 2006)).

Having converted the petition for a writ of habeas corpus into a petition for review, the court of appeals determined that it was appropriate to transfer it to the Eleventh Circuit. Respondents had argued that transfer was mandatory by virtue of Section 106(c) of the REAL ID Act, 119 Stat. 311 (8 U.S.C. 1252 note (Supp. V 2005)), which directs transfer "to the court of appeals for the circuit in which a petition for review could have been properly filed under [8 U.S.C. 1252 (2000 & Supp. V 2005) or 8 U.S.C. 1101 note]," and 8 U.S.C. 1252(b)(2), which provides that a petition for review "shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings." The court of appeals concluded, however, that its previous ruling in *Moreno-Bravo* had held "that § 1252(b)(2) is not a jurisdictional provision," and that "[w]e therefore have discretion, in an appropriate case, to retain a petition such as [petitioner's]." Pet. App. 4.

The court of appeals determined that "under the circumstances of this case," it would not be "appropriate" for it to resolve the petition for review. Pet. App. 4. Unlike the alien in *Moreno-Bravo*, it noted, petitioner was "not presently in custody" and the government had "stipulated at oral argument that [petitioner] will not be returned to custody while his petition is pending before

the Eleventh Circuit." *Id.* at 5.[5] As a result, the court perceived no "manifest injustice in transferring his petition." *Ibid.* In addition, although it "t[ook] no position on the ultimate merits of [petitioner's] claim," the court of appeals stated that was not a "sure loser," *ibid.* (quoting *Phillips* v. *Seiter*, 173 F.3d 609, 611 (7th Cir. 1999)), and that it would not be "futile to transfer the petition to the circuit in which it properly belongs." *Ibid.* (quoting *Moreno-Bravo*, 463 F.3d at 263).

ARGUMENT

The petition for a writ of certiorari should be denied. The case is in an interlocutory posture. In addition, the unpublished summary order of the court of appeals is correct, and it does not conflict with the decisions of this Court or any other court of appeals.

1. No final decision has been entered in this case. The summary order of which petitioner seeks review vacated the district court's decision, converted the petition for a writ of habeas corpus into a petition for review, and transferred the converted petition to the Eleventh Circuit for further proceedings on the merits. Pet. App. 1-6. The case is therefore in an interlocutory posture, a fact that "of itself alone furnishe[s] sufficient ground" for the denial of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); accord *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *American Constr. Co.* v. *Jacksonville Ry.*, 148 U.S. 372, 384 (1893); *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of a writ of certiorari). This Court "ha[s] authority to consider questions determined in

---

[5] The record does not reveal when petitioner was released from custody.

earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals." *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam). For that reason, the Court generally awaits a final judgment in the lower courts before granting certiorari, a practice that promotes judicial efficiency by ensuring that all of a petitioner's claims can be consolidated and presented in a single petition to the Court.

Although this Court's general practice is not an invariable rule, deferring consideration makes particular sense in this case. As the district court noted (Pet. 20-21), under pre-REAL ID Act precedent in the Second Circuit, a court considering a petition for a writ of habeas corpus brought by an alien such as petitioner had jurisdiction to consider "only 'purely legal statutory and constitutional claims.'" Pet. App. 21 (quoting *Sol* v. *INS*, 274 F.3d 648, 651 (2d Cir. 2001), cert. denied, 536 U.S. 941 (2002)). Under the amendments made by the REAL ID Act, petitioner will be able to obtain "review of constitutional claims or questions of law" via a petition for review. 8 U.S.C. 1252(a)(2)(D) (Supp. V 2005). The Eleventh Circuit will thus be able to consider petitioner's claim that the BIA violated his due process rights in granting the INS's motion to reopen and reconsider, and, if it grants relief, there will be no need for petitioner to seek this Court's review. In addition, although proceedings governing petitioner's admissibility have at this point been pending for a number of years, petitioner is not presently in custody, and the government made a commitment to the Second Circuit that it would not seek to return him to custody while his petition for review is pending with the Eleventh Circuit. Pet. App. 5. There is thus no warrant to depart from the

Court's usual practice of denying certiorari in cases in an interlocutory posture.

2. Petitioner's primary contention, which is raised in various forms by the first three questions upon which petitioner seeks review, is that the court of appeals erred in converting his petition for a writ of habeas corpus into a petition for review. Pet. i, 7-22. That claim does not merit further review.

a. The issues petitioner seeks to have this Court address affect a narrow category of aliens, and they lack prospective significance. The first two questions upon which petitioner seeks review depend entirely on the fact that, at the time of the REAL ID's enactment, the Second Circuit was considering *an appeal* from the district court's disposition of his petition for a writ of habeas corpus. Pet. i, 9-18. The third question presented by the petition for a writ of certiorari, in turn, depends entirely on the fact that, at the time of the REAL ID Act's enactment, the district court had entered an order *granting* the requested habeas relief, Pet. i, 19-22, and petitioner appears to rely upon the particular nature of the district court's decision to support his argument with respect to the second question presented as well, Pet. i, 14.

Because the REAL ID Act provides that federal district courts no longer have jurisdiction to consider petitions for writs of habeas corpus filed by aliens who seek to challenge an order of removal, see 8 U.S.C. 1252(a)(5) (Supp. V 2005), the number of aliens affected by these questions is a closed set that cannot increase. And because the REAL ID Act took effect immediately upon its May 11, 2005, enactment, REAL ID Act § 106(b), 119 Stat. 311 (8 U.S.C. 1252 note (Supp. V 2005)), it is likely that most of the limited number of cases that involved

the issues raised by this certiorari petition have already gone to final judgment. As a result, this Court's resolution of the first three questions presented by this petition for a writ of certiorari would be unlikely to affect more than a small number of cases.

b. There is no conflict among the federal courts of appeals with respect to the first three questions presented. As the court of appeals explained, it is "well-established" that although the REAL ID Act does not by its express terms address the situation in which a court of appeals was considering an appeal from a district court's resolution of a petition of a writ of habeas corpus at the time of its enactment, the correct approach is to "convert th[e] appeal into a petition for review under 8 U.S.C. § 1252." Pet. App. 4. *Every* court of appeals to have considered the question has reached that conclusion.[6] Pet. 18 (acknowledging that fact); see Pet. 17 (asserting that the Second Circuit's previous decisions, as well as "this entire line of cases from other Circuits have been incorrectly decided").

Nor is there any conflict among the courts of appeals over the proper course of action in the more particular situation in which a court of appeals was considering a government appeal from a district court order granting a writ of habeas corpus at the time of the Act's enactment. The three other courts of appeals that have con-

---

[6] See, *e.g.*, *Gonzalez-Gonzalez* v. *Weber*, 472 F.3d 1198, 1199 (10th Cir. 2006); *Rafaelano* v. *Wilson*, 471 F.3d 1091, 1095-1096 (9th Cir. 2006); *Padilla* v. *Gonzales*, 470 F.3d 1209, 1213 (7th Cir. 2006); *Moreno-Bravo* v. *Gonzales*, 463 F.3d 253, 256, 257 (2d Cir. 2006); *Rosales* v. *Bureau of Immigration & Customs Enforcement*, 426 F.3d 733, 736 (5th Cir. 2005), cert. denied, 546 U.S. 1106 (2006); *Ishak* v. *Gonzales*, 422 F.3d 22, 30 (1st Cir. 2005); *Bonhometre* v. *Gonzales*, 414 F.3d 442, 446 (3d Cir. 2005), cert. denied, 546 U.S. 1184 (2006).

sidered that precise question have reached the same conclusion as the Second Circuit in this case. See, *e.g.*, *Gonzalez-Gonzalez* v. *Weber*, 472 F.3d 1198, 1199 (10th Cir. 2006) (converting a pending appeal from a district court's grant of a habeas petition into a petition for review pursuant to the REAL ID Act); *Gonzales-Gomez* v. *Achim*, 441 F.3d 532, 533 (7th Cir. 2006) (same); *Bonhometre* v. *Gonzales*, 414 F.3d 442, 446 (3d Cir. 2005) (same), cert. denied, 546 U.S. 1184 (2006).

Although petitioner asserts (Pet. 19-22) that the Second Circuit's decision in this case conflicts with various decisions by other courts of appeals, Pet. 19-21 and n.4, he is incorrect. The decisions cited by petitioner involve situations in which a final administrative order of removal had not been entered,[7] or proceedings in which the alien "d[id] not challenge or seek review of any removal order."[8] See 8 U.S.C. 1252(a)(5) (Supp. V 2005) (repealing habeas jurisdiction only with respect to an alien who is seeking "judicial review of an order of removal"); H.R. Conf. Rep. No. 72, 109th Cong., 1st Sess. 175 (2005) (stating that the REAL ID Act does not "preclude habeas review over challenges to detention that are independent of challenges to removal orders"). In contrast, the whole purpose of the petition for a writ of habeas corpus at issue in this case was to prevent petitioner's removal from the United States pursuant to the final order of removal to which he is currently subject. See Pet. App. 3 (stating that petitioner's "habeas peti-

---

[7] See *Nadarajah* v. *Gonzales*, 443 F.3d 1069, 1073-1075 (9th Cir. 2006) (Pet. 19 & n.4); *Hernandez* v. *Gonzales*, 424 F.3d 42, 42 (1st Cir. 2005) (memorandum and order) (Pet. 19 & n.4)

[8] *Ali* v. *Gonzales*, 421 F.3d 795, 797 n.1 (9th Cir. 2005) (Pet. 19); see *Madu* v. *United States Att'y Gen.*, 470 F.3d 1362, 1366 (11th Cir. 2006) (petitioner "who contests the very existence of an order of removal").

tion challenged a final order of removal entered against him by the Board"); C.A. App. 21. And although petitioner asserts (Pet. 21) that the fact that the district court had granted his petition for a writ of habeas corpus means that "*there [was] no final order of removal* in [his] case" when the REAL ID Act was enacted—and that the REAL ID Act therefore does not apply to this case—he cites no court of appeals decision that has accepted that view, and, as noted above, the Second, Third, Seventh, and Tenth Circuits have all rendered decisions that are inconsistent with it. See pp. 16-17, *supra*. Petitioner continues to seek "judicial review of an order of removal," and thus falls squarely within the scope of the REAL ID Act. See 8 U.S.C. 1252(a)(5) (Supp. V 2005). The fact that the district court ruled in his favor on his challenge does not change the fundamental nature of the case.

c. Further review of the first three questions presented is also unwarranted because the court of appeals' decision to vacate the district court's order and convert the petition for a writ of habeas corpus into a petition for review was correct as a statutory matter and entirely consistent with the Constitution. As the courts of appeals have uniformly held, the REAL ID Act "unequivocally eliminates habeas corpus review of orders of removal," *Marquez-Almanzar* v. *INS*, 418 F.3d 210, 215 (2d Cir. 2005), replacing that avenue of review with a right to petition for review in a court of appeals, and it unambiguously applies to habeas proceedings that are still on-going as of the date of its enactment.[9] See

---

[9] See *Kolkevich* v. *Attorney Gen. of the U.S.*, 501 F.3d 323, 329 (3d Cir. 2007); *Jama* v. *Gonzales*, 431 F.3d 230, 232 (5th Cir. 2005); *Gittens* v. *Menifee*, 428 F.3d 382, 384 (2d Cir. 2005); *Ishak* v. *Gonzales*, 422 F.3d

8 U.S.C. 1252(a)(5) (Supp. V 2005) (stating that, "[n]otwithstanding any other provision of law (statutory or nonstatutory, including section 2241 of title 28, or any other habeas corpus provision, * * * a petition for review * * * shall be the sole and exclusive means for judicial review of an order of removal" and that, "[f]or purposes of this chapter, * * * the term[] 'judicial review' * * * include[s] habeas corpus review" under "any [statutory] habeas corpus provision"); 8 U.S.C. 1252 note (Supp. V 2005) (stating that the REAL ID Act provision just quoted "shall apply to cases in which the final administrative order of removal, deportation, or exclusion was issued before, on, or after the date of the enactment of this division"). The REAL ID Act thus "takes away no substantive right but simply changes the tribunal that is to hear the case." *Hallowell* v. *Commons*, 239 U.S. 506, 508 (1916). Compare *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2765 (2006) (quoting *Hallowell* but construing repeal of jurisdiction not to effect pending cases). Because the REAL ID Act eliminated the jurisdictional underpinning of the district court's judgment, the court of appeals was correct to vacate it and to convert the case into a petition for review.

The fact that Section 106(c) of the REAL ID Act, 119 Stat. 311 (8 U.S.C. 1252 note (Supp. V 2005)) directs that a petition for a writ of habeas corpus that is "pending in a district court on the date of" its enactment shall be transferred to an appropriate court of appeals and treated thereafter as a petition for review does not undermine the court of appeals' analysis. The REAL ID Act does not expressly state what a court of appeals should

---

22, 29 (1st Cir. 2005); *Alvarez-Barajas* v. *Gonzales*, 418 F.3d 1050, 1051 (9th Cir. 2005).

do in situations in which an appeal from a district court's grant or denial of habeas relief was pending as of the date of its enactment. But given Congress's clear endorsement of a conversion-and-transfer procedure for situations in which a petition for a writ of habeas corpus was pending in the district court on the date of the REAL ID's enactment, the courts of appeals have correctly concluded that a similar approach is appropriate when an appeal is pending before the courts of appeals. See note 6, *supra*. As the First Circuit reasoned in *Ishak* v. *Gonzales*, 422 F.3d 22 (2005), even in situations in which an appeal from a district court's order is pending with the court of appeals, the underlying petition for a writ of habeas corpus remains "'pending' in the district court within the meaning of the Real ID Act," because, until the court of appeals resolves the appeal, "the case necessarily remain[s] alive in the lower court although dormant." *Id.* at 30; see *Alvarez-Barajas*, 418 F.3d at 1053 (stating that an alternative conclusion would create "absurd result[s]," because it would mean that a court of appeals would be able to consider the merits of a claim that was "still pending before a district court" on the date of the REAL ID Act's enactment but would "lack jurisdiction" to consider claims that were "pending before the circuits").

Contrary to petitioner's assertions (Pet. 12-18), Congress's elimination of habeas challenges to final orders of removal in this manner raises no constitutional concerns. In situations where it provides "an adequate substitute through the courts of appeals," Congress may, without question, eliminate an alien's ability to seek relief via a petition for a writ of habeas corpus. *INS* v. *St. Cyr*, 533 U.S. 289, 314 n.38 (2001); accord *Swain* v. *Pressley*, 430 U.S. 372, 381 (1977). Petitioner makes no

argument that the review he will be able to receive from the Eleventh Circuit via a petition for review is not "an adequate substitute" for his ability to seek habeas relief from the district court. Such an assertion would be meritless in any event, because petitioner may obtain "review of constitutional claims or questions of law" on a petition for review. 8 U.S.C. 1252(a)(2)(D) (Supp. V 2005). Accordingly, petitioner will receive essentially the same consideration of his claims from the court of appeals through a petition for review as he would have received on appeal of the district court's ruling in the habeas case.

3. In the fourth and final question presented in the certiorari petition, petitioner asserts that, assuming that the court of appeals was correct to convert his petition for a writ of habeas corpus into a petition for review, the Second Circuit nonetheless erred in ordering that the converted petition be transferred to the Eleventh Circuit. Pet. 22-28. Petitioner does not assert that the Second Circuit's decision on this point conflicts with the decisions of any other courts of appeals, and petitioner's factbound claim is meritless in any event. Further review is not warranted.

Section 1252(b)(2) of Title 8, United States Code, provides that a petition for review "shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings." The final order of removal that formed the basis for the detention and prospect of removal from which petitioner sought relief via his now-converted petition for a writ of habeas corpus, see C.A. App. 7, 21, was issued by an IJ sitting in Bradenton, Florida, *id.* at 33-36. As the court of appeals correctly determined (Pet. App. 4), those are the relevant "proceedings" for purposes of Section

1252(b)(2). As a result, Section 1252(b)(2) expressly provides that the petition for review "shall" be heard by the Eleventh Circuit, the court of appeals whose jurisdiction includes the State of Florida.

Even if Section 1252(b)(2) is no more than a venue provision, that would not mean, as petitioner appears to assert (Pet. 22-28), that the determination of which court of appeals is the proper forum in which to pursue a petition for review is subject to a totality of the circumstances balancing in every case. Rather, it would mean only that compliance with Section 1252(b)(2)'s mandatory requirements is not essential in order to invoke a court's subject-matter jurisdiction, and that those requirements may thus be waived by the consent of the parties and that a party may forfeit its entitlement to insist on compliance with them by failing to lodge a timely objection. Cf. Fed. R. Civ. P. 12(h)(1). But respondents *have not* consented to having this petition for review resolved by the Second Circuit, nor have they forfeited the ability to insist upon compliance with Section 1252(b)(2)'s mandatory terms. Gov't C.A. Br. 30-32. As a result, the Second Circuit did not err in "transfer[ring] the petition to the circuit in which it properly belongs," especially in a situation where doing so will work no "manifest injustice" to petitioner. Pet. App. 5.

CONCLUSION

The petition for a writ of certiorari should be denied

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
DONALD E. KEENER
JENNIFER J. KEENEY
Attorneys

JANUARY 2008